IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4844 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

M/S JAY CHEMICAL INDUSTRIES (PARTNERSHIP FIRM)

Versus

GIRISH PRABHUBHAI PATEL

Appearance:

1. Criminal Misc.Application No. 4844 of 2003

MR KB ANANDJIWALA for Petitioner No. 1-3

MR EE SAIYED FOR MR SIKANDER SAIYED

for Respondent No. 1

MR VM PANCHOLI APP for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 19/08/2004

ORAL JUDGEMENT

1. By filing instant petition under Section 482 of the Code of Criminal Procedure ('the Code' for short), petitioners seek to challenge order dated 27.5.2003 passed by the learned Additional Sessions Judge, Surat in Criminal Revision Application No. 334 of 2002 by which the order dated dated 27.9.2002 passed by the learned JMFC, Court No.3, Surat below application Ex.107 in Criminal Case No.33 of 1999 rejecting an application filed under Section 91 of the Code by the petitioners praying for issuance of witness summons for production of certain documents came to be affirmed.

2. The facts giving rise to the present petition, in brief, are as under:

2.1. Respondent No.1/original complainant, Girish Prabhubhai Patel ('the complainant' for short) filed a complaint for alleged commission of offence under Sections 138 of the Negotiable Instruments Act ('the Act" for short) and under Section 420 of IPC on the ground that on account of good relations with the petitioners, the complainant lent an amount of RS.9 lakhs as the petitioners were in need of money for their business purpose. The petitioners by way of security gave three cheques drawn in favour of the complainant and on presentation of the same for realization they were dishonoured and hence the complaint being Criminal Case No.33 of 1999 was filed by the complainant in the Court of learned JMFC, Surat. The learned JMFC, 3rd Court, Surat, issued summons against the petitioners and recorded pre-charge evidence wherein the complainant was examined vide Exh.60. The witnesses produced by him were examined vide Exhs.87 and 88. After recording the pre-charge evidence, the learned Magistrate passed an order to frame charge under section 420 of IPC instead of the offence under section 138 of the Act.

2.2. The said order was challenge by the petitioners by way of filing Criminal Revision Application No. 594 of 2001 before this Court which is still pending for hearing. The very same order was also challenged by the complainant by way of preferring Criminal Revision Application before the learned Sessions Judge, Surat. The learned Sessions Judge allowed that Criminal Revision Application and directed the learned Magistrate to frame charge under Section 138 of the Act alongwith the offence under section 420 of IPC. However, Criminal Revision Application No. 594 of 2001 preferred before this Court is still pending.

2.3. The learned Magistrate thereafter framed the

charge against the petitioners and thereafter proceeded further with the trial. The complainant is in the witness box and during the cross-examination, he deposed that he is filing the Income-tax Returns, Maintaining Books of accounts and he also agreed to produce the same as and when required by the Court. The petitioners thereafter preferred an application Ex.78 praying that the complainant may be directed to produce the following documents:

(i) Pass book of Account No.11610 being maintained with Union Bank of India, Nanpura Branch, Surat;

(ii) Income-tax Returns for the Assessment Year 1996-97 and 1997-98;

(iii) Statements of accounts and balance sheet produced alongwith the Income-tax Returns;

(iv) Copy of the licence of Jalaram Auto Garage under Shops & Establishment Act;

(v) Statements of accounts and other documents showing payment of salary being paid to the employees working at Shree Jalaram Auto Garage and other details of investment.

2.4. The learned Magistrate vide order dated 9.8.2002, directed the complainant to produce certain documents as they were required during the course of cross-examination. If the complainant is not possessing any such document then he was directed to declare the same by filing pursis. Thereafter the complainant submitted a pursis stating that he does not want to produce any such document. The said pursis is at Ex.106. Thereupon the petitioners submitted an application at Ex.107 under Section 91 of the Code requesting to summon:

(i) Competent Officer of Union Bank of India, Nanpura, Surat to produce the documents pertaining to the Bank Account being No.11610 in the name of Girishbhai Prabhubhai Patel alongwith the Account Opening Application form, Specimen Signature Card, Pay in slip along with cheque Nos.5686, 5687 and 5688 dated 13.11.1998 and 18.11.1998 produced on 13.11.1998 and 18.11.1998 and the extract of Bank Account No.11610 for the years 1996-97 and 1997-98.

(ii) Responsible Income-tax Officer from Income-tax Department, Surat alongwith the copies of the

Income-tax Returns for the Assessment years 1996-97 and 1997-98 which have been submitted by the complainant Girishbhai Patel - Proprietor of Shree Jalaram Auto Garage alongwith the copy of the balance sheet and profit and loss accounts.

(iii) The officer concerned of Municipal Corporation, Surat to produce the licence or permission to do business in the name and style of Jalaram Auto Garage under the Shops & Establishment Act.

2.5. The learned Magistrate vide order dated 27.9.2002 partly allowed the said application and directed the complainant to produce documents as prayed for in the Court on the next adjourned date and if the said documents were not in his possession, he was further directed to state the same on affidavit. Though a specific prayer was made to call certain witnesses from respective Department for production of documents which were lying with such Department in the name of the complainant, the learned Magistrate passed an order rejecting the said prayer.

2.6. The petitioners being aggrieved by the said order passed by the learned JMFC, Court No.3, Surat, preferred Criminal Revision Application No.334 of 2002 before the Sessions Court, and the learned Additional Sessions Judge, Surat, rejected the said Revision Application vide order dated 27.5.2003 which has given rise to the present petition.

3. Mr. KB Anandjiwala, learned advocate of the petitioners, has submitted that the petitioners preferred an application vide Ex.107 under section 91 of the Code for calling certain witnesses for the purpose of production of certain documents which were either submitted in their respective departments by the complainant or are in possession of certain documents in the name of the complainant. According to him, the reasons given by the learned Magistrate are absolutely contrary to law and therefore the order passed by the learned Magistrate which is affirmed by the learned Additional Sessions Judge is required to be quashed and set aside. He further submitted that it is settled principle of law that an accused must have a fair trial and the prosecution is under a duty to see that undesirable hurdles are not created in the defence of the accused. Therefore, the Court is under a duty to grant an application made by an accused under Section 91 of the Code at any stage of the case. In support of the aforesaid proposition of law, he relied upon the judgment

of this Court in Maheshchandra K. Trivedi v. State of Gujarat, 2000 (1) GLR 701. On aforesaid premises, Mr. Anandjiwala, learned advocate of the petitioners, urged to allow this petition and grant application Ex.107.

4. In counter submission Mr. EE Saiyed, learned advocate of the complainant has submitted that there are concurrent finding of fact recorded by both the courts below which cannot be assailed in a petition filed under section 482 of the Code unless it is shown to this court that the order passed by the learned Magistrate which is affirmed by the learned Additional Sessions Judge is contrary to law, perverse and passed on extraneous considerations. He also contended that there should not be any compulsion to produce certain documents and he has also submitted that such application has been given to delay the trial. According to him, the application preferred by the present petitioners at Ex.107 is preferred with a view to delay the trial and therefore the order passed by the learned Magistrate and the order passed by the learned Additional Sessions Judge, Surat by which the order of the learned Magistrate came to be affirmed do not suffer from any vices and no illegality is committed by the learned Magistrate as well as the learned Additional Sessions Judge. He, therefore, submitted that this petition lacks merit and deserves to be rejected. He therefore urged to reject the petition.

5. Mr. VM Pancholi, learned A.P.P. has urged to pass appropriate orders on the facts and circumstances of the case and in light of the decision of this Court in Maheshchandra K Trivedi's case (supra).

6. I have considered the submissions advanced by the learned advocates appearing for the parties. I have also perused the averments made in the petition as well as both the orders impugned before this Court, one passed by the learned Magistrate and another by the learned Additional Sessions Judge whereby the order passed by the learned Magistrate is affirmed.

7. On having perusal of the same, it becomes abundantly clear that the petitioners have moved an application vide Ex.78 praying that the complainant be directed to produce four documents. The said application was allowed vide order dated 9.8.2002 directing the complainant to produce the documents. However, it is also directed that by the said order that if the complainant is not in possession of those documents, he may declare the same by filing pursis. Therefore, the complainant has filed pursis Ex.106 stating that he is

not in possession of those documents. Thereupon the petitioners preferred Application EX.107 under section 91 of the Code praying to issue summons to (i) Union bank of India, Nanpura Branch, Surat, (ii) Income Tax Officer, Surat and (iii) Surat Municipal Corporation.

8. It is obvious that when the complainant has declared by filing pursis that he is not in possession of those documents, it is the right of the petitioners to pray for issuance of summons for production of those documents which according to them were submitted by the complainant to those Departments. Though the learned Magistrate has directed the complainant to produce certain documents, if those documents were not in his possession, the complainant was permitted by learned Magistrate to declare the same by filing pursis and since the complainant has declared by filing pursis at Ex.106 that he does not want to produce those documents as he is not in possession of those documents, this prompted the petitioners to file application Ex.107 under section 91 of the Code for issuance of witness summons. It appears that the learned Additional Sessions Judge has misdirected himself that after order below Ex.107 was passed, the complainant has produced xerox copy of the Income tax Return and therefore the prayer of the petitioners that the Officers of concerned Department should come to the Court and produce certain documents is not acceptable. According to this Court, the learned Additional Sessions Judge has also misdirected himself in observing that the petitioner can also call for true certified xerox copies of certain documents and produce before the Court and as the complainant has already produced the xerox copy of Income tax Return, the Criminal Revision Application is not required to be allowed. The finding recorded by the learned Additional Sessions Judge is that though the order of the Magistrate can be said to be illegal or irregular no interference is warranted keeping in mind the scope of powers of revision, which, according to this court, is contrary to the fair trial in view of the decision of this Court in Maheshchandra K. Trivedi's case (supra).

9. It is true that concurrent finding of fact arrived at by both the courts below cannot be assailed in a petition filed under Section 482 of the Code as it tantamount of second revision. However, it is also a settled principle of law that if the order passed by the courts below are contrary to the provisions of law, against settled canons and against the principles of fair trial and in accepting the prayer made by the petitioners no prejudice is caused to either of the side, the said

order is required to be quashed and set aside.

10. In aforesaid view of the matter, according to this Court, this petition deserves to be allowed by granting the application Ex.107 filed by the petitioners in Criminal Case No.33 of 1999 pending in the Court of learned JMFC, 3rd Court, Surat.

11. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The order dated 27.5.2003 passed by learned Additional Sessions Judge, Surat in Criminal Revision Application No.334 of 2002 by which the order dated 27.9.2002 passed by the learned JMFC, 3rd Court, Surat below application Ex.107 in Criminal Case No.33 of 1999 rejecting an application filed under Section 91 of the Code for issuance of witness summons for production of certain documents has been confirmed, is hereby quashed and set aside and as a result of it, both the orders impugned in this petition stand quashed and set aside. The application Ex.107 preferred by the petitioner under Section 91 of the Code for issuance of witness summons for production of certain documents in Criminal Case No.33 of 1999 pending in the Court of learned JMFC, 3rd Court, Surat, is hereby allowed. Rule is made absolute to the aforesaid extent.

(A.M. Kapadia, J.)

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